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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-207

MARVIN R. COLE, ARTHUR A. FISCHER and
COLE, FISCHER & ROGOW, INC.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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In its brief in opposition, the government fails to respond to the issues raised in the petition. An analysis of what the government says, and what it does not say, underscores the importance of the issues raised and the appropriateness of the case for certiorari.

1. The government contends that the concededly accurate reading of Judge Westover's remarks concerning Benton's credibility, introduced by the defense to mitigate the effect of highly inflammatory testimony elicited by the prosecution (see Petition, p. 9, n. 5), should be equated to

the perjury committed by the defendants in *Walder* v. *United States,* 347 U.S. 62 (1954) and *Harris* v. *New York,* 401 U.S. 222 (1971); thereby sanctioning proof of Cole's constitutionally defective prior conviction. It is the government's theory that the rule of *Burgett* v. *Texas,* 389 U.S. 109 (1967), and its progeny may be ignored—not because the defense's evidence was false or inaccurate, but—in order to permit the government to show that Judge Westover's opinion was not a shared view (Brief in Opposition, pp. 10-11).[1]

There is no authority for this proposition, and to the extent that it purports to rest on notions of fairness (see Brief in Opposition, p. 10), the equation must topple of its own imbalance: First, because it ignores the lower court's concession that the conviction itself was an "irrelevant fact" and that only one of the three inflammatory "Benton" statements introduced by the government was even marginally relevant (10a, 14a); second, because it ignores the fact that Benton did not testify at the present trial and could not be cross-examined; and third, because the government's constitutional disability resulted not from an impulsive "constable's blunder," but from 15 months of continuous illegal

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[1] It is not contended that the events below even remotely approached the circumstances present in *Harris* and *Walder.* Moreover, proof of the invalid conviction cannot be said to have "completed the picture"—even if that would be sufficient to rationalize its use—because the California jury could have convicted Cole without believing the substance of the Benton "statements" presented to the jury here; indeed, the reference to Nate Stein related to an incident years earlier in which Cole was not involved in any way; and one of the "statements" referred to a conversation seven years prior to the events in question at the California trial.

activity and 10 years of active concealment.[2]

But the fundamental fallacy in the government's argument is that it amounts to no more than the construction of what might have been a legitimate purpose for admissibility if the conviction had been *valid,* even though Cole did not testify or otherwise put his character in issue. Basic to the holdings of *Burgett* v. *Texas, supra, United States* v. *Tucker,* 404 U.S. 443 (1972), and *Loper* v. *Beto,* 405 U.S. 473 (1972), however, is the principle that legitimacy of purpose does not overcome the renewed deprivation where the prior conviction is constitutionally invalid.[3]

2. Implicitly conceding that the "taint" of its focus and trial evidence must be measured by what actually occurred, rather than what "would have" occurred if it had obeyed the law, the government contends that the court below did not apply a "would have" standard. For its principal sup-

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[2] The government suggests that petitioners did not preserve the point because they did not move for a continuance or at least object that the *coram nobis* proceeding was pending (Brief in Opposition, p. 9, n. 12). However, trial counsel's entry into the case was on condition that no continuance would be sought, and the trial judge was aware that the conviction was under attack (R. 331a-334a). In any event, any such "waiver" argument is necessarily foreclosed by *Loper* v. *Beto,* 405 U.S. 473 (1972).

The government also urges that its consent to the *coram nobis* petition was not given until after the verdict here because it then "discovered" additional records (Brief in Opposition, p. 3, n. 2). There is no support for this statement. In its *unsworn* consent, the government stated merely that it had "reviewed" additional records (always in its possession), and gave no indication whether this had occurred before or after commencement of trial or verdict here (R. 252a-253a).

[3] As in *Loper,* "This is not a case where the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand." 405 U.S. at 482, n. 11.

port, the government points to the fact that the court below said that its holding did not undermine the "would have" prohibition "because we find that the Government proved that the evidence resulted from the legal saturation investigation" (22a). This conclusion, however, resulted from the lower court's premise that "the 'cause' of the saturation investigation" was the Benton statement. *(Ibid.)*.

The crux of the error below and the central flaw in the government's position here is that in determining the "cause" of the saturation investigation—*i.e.*, of the government's focus on petitioners—the lower court applied the very standard it and the government say was rejected as improper: It held the government to a burden of showing only that the saturation investigation "would have" been launched even if no information had been received from illegal electronic surveillance (17a). The lower court did *not* require the government to show that the *actual* cause of its investigation—and the ultimate cause of its trial evidence—was in fact information lawfully in its possession.[4]

That the lower court applied a hypothetical test in arriving at its conclusion is clear from the government's reliance—not on any analysis of what in fact "caused" the

[4] The government states that the illegal surveillance occurred prior to the acts for which petitioners were prosecuted, implying a lack of any relationship between the surveillance and the prosecution (Brief in Opposition, p. 11, n. 16). This misses the point. Petitioners were charged, as the court below noted (6a), with "a *pattern* of having CFR take deductions for personal expenses of Cole and Fischer," precisely the pattern of conduct revealed by the illegal eavesdropping. And in suggesting that there was no interagency contact during the surveillance (Brief in Opposition, p. 11, n. 17), the government overlooks a contemporaneous IRS memorandum reciting that "Cole's activities are the subject of conferences with the F.B.I. and U.S. Attorney's Office" (DXT P).

saturation investigation, but—on the lower court's speculations as to the circumstances in which saturation investigations would be warranted and those in which they would not (Brief in Opposition, p. 13, n. 18). That the court below applied the erroneous "would have" standard is perhaps most evident, however, from its rejection of Farber's testimony that his request for the investigation resulted from both legal *and* illegal information.[5] Notwithstanding that testimony, the lower court simply concluded he *would have* sought the investigation even if there had been no illegally obtained information (20a).[6]

The opinion of the court below leaves no room for doubt that it reached its conclusion only by the application of a hypothetical and erroneous "would have" test.

[5] As noted in the Petition (pp. 13-14, n. 7), there is grave doubt that, in selecting Farber, the government produced the proper witness.

[6] Also rejected—and unmentioned—in favor of speculation that a saturation investigation "would have" been ordered even if there had been no illegal information were the undisputed facts that (a) the IRS Chief of Intelligence, in a memorandum contemporaneous with the investigation, wrote that the source of the investigation related to information from illegal sources (DXT AH-1; Appendix E to the Petition, 27a-28a); (b) the IRS Agent in charge of the investigation testified that the request for the saturation investigation was based on information derived from the illegal bug (TH. 230), and (c) there never was any investigation—saturation or otherwise—of the legally derived information—only the illegally obtained leads were pursued.

We note the government's reliance on the formal written request for the saturation investigation referring only to the legally derived information (Brief in Opposition, p. 7, n. 9), We note, too, that every other pertinent document referred solely to the illegally derived information, and that immediately prior to the formal written request, a series of inter-agency airtels instructed the U.S. Attorney to open a new file relating to Cole in order to conceal the existence of illegally obtained information (see Petition, pp. 16-18; 29a-40a).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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